

SERVICE DATE - JUNE 19, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34003

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY—CONSTRUCTION AND OPERATION EXEMPTION—SEADRIFT AND
KAMEY, TX

Decided: June 12, 2001

By petition filed on January 31, 2001, The Burlington Northern and Santa Fe Railway Company (BNSF) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authority to construct and operate a 7½-mile line of railroad between Seadrift and Kamey, TX. The proposed line will connect with an industrial complex of the Union Carbide Corporation (UCC)¹ at Seadrift (the complex) and with the former Southern Pacific Transportation Company (SP)² line, now owned by Union Pacific Railroad Company (UP), between Placedo and Port Lavaca, TX, near Kamey. The purpose of the proposed construction is to provide the complex, which is served exclusively by UP, with competitive rail service. To expedite the transaction, BNSF requests that we conditionally grant the exemption, subject to our environmental review. A comment in opposition to the construction exemption was filed by Virgil R. Pulliam. We will conditionally grant the requested exemption, and will issue a final decision after completion of the environmental review process.

BACKGROUND

The UCC complex is located about 120 miles southwest of Houston, TX, near the Gulf Coast. UCC produces several billion pounds of chemicals and plastics a year at the complex, which are shipped to other UCC facilities in the United States for further processing or are shipped to various customers throughout the country. Due to the nature of UCC's operations, the majority of the plastics and a significant portion of the chemicals produced at the complex are

¹ On January 31, 2001, UCC filed a petition for leave to intervene and to become a party in this proceeding. The petition was granted by decision served on February 14, 2001. On March 9, 2001, UCC advised the Board that UCC has merged with The Dow Chemical Company (Dow). UCC states that it continues to exist as the same corporate legal entity, but as a wholly owned subsidiary of Dow rather than a publicly traded company.

² In 1996, the Board approved the acquisition of SP by Union Pacific Corporation. See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP Merger), aff'd sub nom. Western Coal Traffic League v. Surface Transp. Bd., 169 F.3d 775 (D.C. Cir. 1999).

shipped out by rail. The complex also receives significant quantities of inbound chemicals by rail.

In order to provide an alternative to UP's exclusive rail service, UCC determined, in the late 1980's, that a build-out from the complex to SP's Victoria-Port Lavaca line would be feasible. Although SP agreed with UCC's determination, and UCC proceeded to acquire the necessary rights-of-way for the build-out, it was never constructed because a full commercial agreement was not reached with SP. In UP/SP Merger, UCC, which was a party to the proceeding, requested that the Board preserve the competition between UP and SP created by the potential build-out. The Board granted UCC's request by conditioning approval of the merger upon the grant of trackage rights to BNSF over SP's Victoria-Port Lavaca line in conjunction with the right of BNSF to serve shippers via build-ins/build-outs. See UP/SP Merger at 475. UCC is now prepared to go forward with the project and has requested BNSF to provide service through a combination of the UP/SP Merger trackage rights and a build-out. BNSF has agreed.

The new line will connect with the former SP line at a point near Kamey, just west of Port Lavaca. According to BNSF, the line will travel through largely undeveloped land which is sparsely populated and used mostly for agriculture and some ranching. It is land that is either owned by BNSF or UCC or land to which they have secured access for the purpose of constructing the new line.

BNSF will serve the new line by operating on UP's Algoa-Brownsville, TX main line, over which BNSF also has trackage rights as a result of the UP/SP merger. Near Placedo, the trains will turn onto the former SP line and then proceed to a turn-out onto the new line near Kamey. After providing service to the complex, BNSF trains will return west over the former SP line to the UP main line. It is anticipated that BNSF will run one train of approximately 25 to 30 cars each way per day. BNSF states that it intends to promptly enter into a trackage rights agreement with UP, finalizing the terms for the trackage rights required by the Board in the UP/SP Merger, and will file an appropriate notice of exemption under the Board's procedures at 49 CFR 1180.2(d)(7) and 1180.4(g). If it is unable to reach an agreement with UP, it will seek a resolution of the dispute by the Board.

Mr. Pulliam and his mother, Lurline McKamey Pulliam, are owners of farmland that allegedly will be affected by the proposed construction of the new rail line.³ The Pulliams state that they first learned of the proposal when a railroad representative asked them to sign an option agreement for an easement that would be needed in order to change the grade of U.S. Highway 87 for the creation of an overpass. According to the Pulliams, the combined effect of the elevation of the grade of U.S. Highway 87 and the elevation of grade necessary for construction of a railroad road bed through this area will effectively create a dam that will cause

³ The Pulliams' property is located a few hundred yards from the intersection of U.S. Highway 87 and the proposed rail line.

flooding of their land during periods of heavy rainfall. In addition to the potential loss of the productive value of area farmland, the Pulliams state that the project presents a potential hazard to the public by exacerbating the risk of flooding of lower portions of U.S. Highway 87 during the hurricane season when it may be required for emergency evacuation of the residents of Port Lavaca and other coastal communities.

The Pulliams question the necessity for the construction exemption. They submit that there is no evidence that UCC has sustained or is likely to sustain any injury from an abuse of market power by its present rail carrier, and that the public interest is better served by closer regulatory scrutiny of railroad rates rather than by construction of redundant railroad lines. Absent clear and convincing proof that the properties and economic interests of the farming community in the area will not be irreparably harmed by the construction, the Pulliams urge denial of the petition for exemption.

DISCUSSION AND CONCLUSIONS

The construction and operation of railroad lines require prior Board approval under 49 U.S.C. 10901. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

BNSF requests that we expeditiously issue a decision conditionally granting its petition for exemption, subject to issuance of a final Board decision after all environmental reviews have been completed. The Pulliams object to approval of the exemption on an expedited basis, arguing that it is not in the public interest if the effect is to limit the opportunity for full hearings on all issues relating to the construction of the proposed line.⁴

We have consistently handled rail construction applications or exemption requests by first considering the transportation issues and later addressing the environmental issues. This approach does not diminish our capacity to consider environmental matters when we issue a final decision following the completion of the environmental review. Because no construction may begin until our final decision has been issued and has become effective, all environmental matters raised in this proceeding will be fully considered. Great Salt Lake and Southern Railroad, L.L.C.—Construction and Operation—In Tooele County, UT, STB Finance Docket No. 33824, slip op. at 5 (STB served Dec. 15, 2000) (Great Salt Lake).

⁴ The Pulliams state that there should be an opportunity for fully informed comment by representatives of all affected interests, including property owners, representatives of the Texas Department of Transportation (whose present and future right-of-way will be affected), representatives of the drainage districts responsible for the direction and control of surface water runoff, and other public authorities responsible for the environment and public health and safety.

Turning to the transportation-related aspects of the proposal, the Pulliams' views on the merits of the construction are not in accord with the statute. Finding that a shipper sustained or is likely to sustain injury from an abuse of market power by its present carrier is not a prerequisite for approval of a build-out. On the contrary, in enacting the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, Congress intended to facilitate rail construction by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to requiring approval unless the agency finds the project is inconsistent with the PC&N. Under this new standard, proposed rail construction projects are to be given the benefit of the doubt. Great Salt Lake, slip op. at 5.

Based on the information provided, we conclude that detailed scrutiny of the proposed construction and operation under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy. The requested exemption will promote that policy by providing alternative rail service options to UCC and by increasing competition [49 U.S.C. 10101(1) and (4)]. Exempting the proposed construction and operation will reduce the need for Federal regulation, ensure the development of a sound transportation system with effective competition among rail carriers, foster sound economic conditions, and reduce regulatory barriers to entry [49 U.S.C. 10101(2), (4), (5), and (7)]. Unless determined otherwise following the environmental analysis, nothing on the record indicates that other aspects of the rail transportation policy will be adversely affected.

Regulation of the transaction is not necessary to protect shippers from an abuse of market power. Rather, the proposed transaction will enhance competition by providing UCC with an additional rail transportation option. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

BNSF has consulted with our Section of Environmental Analysis (SEA) regarding the environmental review process. It requested and received from SEA a waiver of the 6-month prefiling notice required by 49 CFR 1105.10(a) and a waiver of the requirement in 49 CFR 1105.6(a) that an environmental impact statement be prepared. It also has received approval, pursuant to 49 CFR 1105.10(d), to retain an independent third-party consultant to prepare the environmental documentation for this project. After a final environmental assessment is issued, we will issue a further decision addressing the environmental issues and making the exemption effective at that time, if appropriate, thereby allowing construction to begin. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994); Illinois Commerce Com'n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir 1988), cert. denied, 488 U.S. 1004 (1989).

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we conditionally exempt BNSF's construction and operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal.
2. On completion of the environmental review, we will issue a further decision addressing those matters and making the exemption effective at that time, if appropriate.
3. Notice will be published in the Federal Register on June 19, 2001.
4. Petitions to reopen must be filed by July 9, 2001.
5. This decision is effective 30 days from date of service of this decision.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary